IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19-03-2005

CORAM

THE HONOURABLE MR. JUSTICE N.KANNADASAN

WRIT PETITION No.10546 of 1997

M/s.The Indian Home Pipe
Company Ltd., No.45, Nelson
Road, Tiruvanaikoil,
Trichy-620 005. .. Petitioner

Vs.

1.Customs, Excise and Gold
(Control) Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan, Annexe Building,
Haddows Road, Chennai-600 006.

2.The Commissioner of Central Excise
(Appeals), 1, Williams Road,
Tiruchirappalli-620 001.

3.The Assistant Commissioner of Central
Excise, 4, Promanade Road,
Tiruchirappalli-620 001. .. Respondents

Writ petition filed under Article 226 of the Constitution of India praying for the issue of a Writ of Certiorarified Mandamus, calling for the entire records of the first respondent in its order No.818 to 825 of 1997 dated 24.3.1997, quash the same and consequently to direct the third respondent to classify the bent pipes under sub-heading 7305.90 of the Central Excise Tariff Act, 1995.

For Petitioner : Mr.Arvind P.Datar,
Senior Counsel for
Mr.R.Senthilkumar.

For Respondents : Mr.K.Veeraraghavan,
Senior Central Govt.
Standing Counsel.

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ORDER

The above writ petition is filed seeking the relief as stated therein.

2. The petitioner entered into a contract with TWAD board for supply of MS Pipes and supplies of various sizes for the water supply schemes at Pudukottai, Madurai and Coimbatore. As per the contract, the petitioner has to lay down pipes for the supply of water and the pipes have to be bent to suit the topographic conditions. In order to withstand the water pressure, instead of connecting two joints like elbows and screws, the necessary bend has to be made in the said pipes. The petitioner classified those goods under the heading 73.05 and sub heading 7305.90 for the classification of the Central Excise. Though the third respondent has approved the classified list initially under the said heading 7305.90 of the heading 73.05, subsequently, a show cause notice was issued to revise the classification under the heading 7307.07. After an enquiry, the third respondent has confirmed the demand and the appeal preferred before the second respondent was also dismissed, against which a further appeal before the first respondent tribunal was filed. The first respondent tribunal confirmed the order of the authorities which is under challenge in the above writ petition.

3. The issue to be decided in the above writ petition is as to whether the items fall within the classification 7307.00 or it falls under the classification 73.05 under sub-heading 7305.90?

4. The relevant headings are reproduced below for the purpose of reference:

"7307.00 Tube or pipe fittings (for example, couplings, elbows, sleeves), if iron or steel

73.05 Other tubes and pipes (for example, welded, riveted or similarly closed), having internal and external circular cross-sections, the external diameter of which exceeds 406.4 mm, of iron or steel.

7305.10 - Of iron

7305.90 - Other"

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5. The learned senior counsel for the petitioner would contend that inasmuch as the bending of pipes are mainly done at the site to suit the specifications to lay the pipelines under the sub heading, the said components cannot be termed as "pipe fittings" falling under the classification 7307.00. In the light of the distinct description as set out in both the classifications viz., 7307.00 and 73.05 relating to "tube or pipe fittings"; and "other tubes and pipes", the said components could be construed only under the heading "other tubes and pipes". Learned senior counsel would also contend that the said pipe fittings are primarily prepared at site by welding and riveting and no manufacturing process is involved and the same are not marketable and as such, no duty could be levied. Learned senior counsel would also contend that the goods must be understood as per the test of commercial parlance and test of marketability and no duty could be levied unless manufacturing process is involved.

6. In the light of the above submissions, the learned senior counsel has relied upon the decision of the Apex Court in BHARAT FORGE AND PRESS INDUSTRIES (P) LTD vs. COLLECTOR OF CENTRAL EXCISE (1990 (45) E.L.T. 525 (SC)), wherein it is held that bending of pipes per se will not amount to manufacture and no duty could be claimed. Learned senior counsel also placed reliance upon the decision of the Apex Court in BHARAT FORGE AND PRESS INDUSTRIES (P) LTD vs. COLLECTOR OF CENTRAL EXCISE (1990 (45) E.L.T. 525 (SC)) to substantiate that no duty could be demanded, since the product is not marketable and it should be understood as per the commercial parlance. He would further add that inasmuch as the marketing process is not involved, no duty can be levied. It is also contended that while classifying the goods, the product should not be classified based on scientific and technical terms. In this connection, he has placed reliance upon the decision of the Apex Court in INDO INTERNATIONAL INDUSTRIES vs. COMMISSIONER OF SALES TAX (1981 E.L.T. 325 SC), wherein it is held that clinical syringes could not be treated as "glass works".

7. Per contra, the learned Senior Central Government Standing Counsel appearing for the respondents would contend that all the authorities have rendered a finding of fact to the effect that the product falls under the particular category and the tribunal by considering the definition of pipes and tubes as given in HSN (Hormonised System of Nomenclature), held that the product has to be classified as pipe fittings, falling under tariff heading 7307 and as such, no interference is called for.

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8. The learned Senior Central Government Standing Counsel would also contend that as per the decision rendered by the Apex Court in COLLECTOR OF CENTRAL EXCISE, BARODA vs. L.M.P.PRECISION ENGG. CO. LTD (2004 (9) SCC 703), entry has to be interpreted by referring to the express words in the tariff heading. He has also placed reliance upon the decision of the Apex Court in O.K.PLAY (INDIA) LTD vs. COMMISSIONER OF CENTRAL EXCISE, DELHI-III, GURGAON (2005 (2) SCC 460) to the effect that the guidelines as given in HSN should be looked into considering the product as used in the trade or common parlance. He further contended that the taxing statutes should be interpreted by literal and strict construction as found in the statues and placed reliance upon the decision of the Apex Court in HANSRAJ AND SONS vs. STATE OF JAMMU AND KASHMIR AND OTHERS (2002 (6) SCC 227). The learned Senior Central Government Standing Counsel would also contend that only an appeal shall lie and the writ petition is not maintainable in law and that judicial review is not permissible inasmuch as there is no procedural infraction in the decision making process.

9. I have considered the rival contentions of the learned counsel appearing on either side.

10. The authorities as well as the first respondent tribunal mainly proceeded on the footing that under the description pipe fittings as set out in the HSN, the product falls under the said classification and the petitioner herein has not adduced any evidence to substantiate his claim. The decision of the Apex Court in BHARAT FORGE AND PRESS INDUSTRIES (P) LTD vs. COLLECTOR OF CENTRAL EXCISE (1990 (45) E.L.T. 525 (SC)), deals with the classification of the pipe fittings. Even though the said decision was rendered under tariff item 26AA (iv) of the erstwhile tariff, the observation contained therein about the pipe fittings, cannot be ignored. The Supreme Court, while dealing with the issue in the said decision, has held that though all pipes and tubes cannot be described as pipe fittings, has gone to the extent of holding that the pipe fittings are only species of pipes and tubes. It is only under the said context, in the subsequent classification, the product pipe fittings is described by citing examples such as couplings, elbows, sleeves. While describing other tubes and pipes, in the tariff classification, it is clearly described as welded, riveted or similarly closed. It is not the case of the respondents that the petitioner joints the two pipes by using couplings, elbows or sleeves.

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11. Even the tribunal, in paragraph-5 of its order, has observed that the item in question is formed out of portions cut at desired angles from the pipes by welding different pieces with the ends cut at desired angles. The tribunal in the very same paragraph has also observed that the bend is formed by reason of welding of different pieces to withstand the high pressure of water which flows from one end of the straight line pipe to the other end of another straight line pipes so laid. Though the tribunal has observed as above, has considered the fact that functionally the pieces in question function as joints between two pipes, classified the product at the entry 7307.00. Inasmuch as a clear description is given about the product of pipe fittings under entry 7307.00 by citing examples such as couplings, elbows or sleeves, the tribunal is not correct in holding that the product also functions as a joint of two pipes. On the other hand, under entry 73.05, the pipes are described as a product which can be welded, riveted or similarly closed. Admittedly, even as per the finding rendered by the tribunal, the process of welding is involved with regard to the product in question. If that is so, as per the decision of the Apex Court in COLLECTOR OF CENTRAL EXCISE, BARODA vs. L.M.P.PRECISION ENGG. CO. LTD (2004 (9) SCC 703) and HANSRAJ AND SONS vs. STATE OF JAMMU AND KASHMIR AND OTHERS (2002 (6) SCC 227), if literal and strict construction is given, the product will not fall under classification 7307.00. But on the other hand, it would fall under classification 73.05 under sub heading 7305.90.

12. The tribunal erred in defining the product as "pipe fittings" by considering the definition of "pipe and tubes" as given in HSN. The definition of "pipes and tubes" as given in HSN is set out hereunder:-

> "Tubes and pipes
>
> Concentric hollow products, of uniform cross-section with only one enclosed void along their whole length, having their inner and outer surfaces of the same form. Steel tubes are mainly of circular, oval, rectangular (including square) cross-sections but in addition may include equilateral triangular and other regular convex polygonal cross-sections. Products of cross-section other than circular, with rounded corners along their whole length, and tubes with upset ends, are also to be considered as tubes. They may be polished, coated, bent (including coiled tubing), threaded and coupled or not, drilled, waisted, expanded, cone shaped or

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fitted with flanges, collars or rings."

The definition of "pipe fittings" as out in the HSN reads as follows:-

> "This heading covers fittings of iron or steel, mainly used for connecting the bores of two tubes together, or for connecting a tube to some other apparatus or for closing the tube aperture. This heading does not however cover articles used for installing pipes and tubes but which do not form an integral part of the bore (e.g., hangers, stays and similar supports which merely fix or support the tubes and pipes on walls, clamping or tightening bands or collars (hose clips) used for clamping flexible tubing or hose to rigid piping, taps, connecting pieces, etc.) (heading 73.25 or 73.26).
>
> The connection is obtained:
>
> - by screwing, when using cast iron or steel threaded fittings;
> - or by welding, when using butt-welding or socket-welding steel fittings. In the case of butt-welding, the ends of the fittings and of the tubes are square cut or chamfered;
> - or by contact, when using removable steel fittings.
>
> This heading therefore includes flat flanges and flanges with forged collars, elbows and bends and return bends, reducers, tees, crosses, caps and plugs, lap joint stub-ends, fittings for tubular railings and structural elements, off sets, multi-branch pieces, couplings or sleeves, clean out traps, nipples, unions, clamps and collars."

A perusal of definition of both the headings disclose that the process of welding is involved. But however, the "pipe fittings" proceeds to the effect that the said heading covers fittings of iron or steel, mainly used for connecting the bores of two tubes together, or for connecting a tube to some other apparatus or for closing the tube aperture. The abovesaid description does not find place in the definition of "tubes and pipes".

13. In the case on hand, the product is not used to connect the two pies, but on the other hand, the process of welding is involved by connecting the pipes at desired angles in the different pieces and the pipe is bent to withstand high pressure of water which flows from one end of pipes to the

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other end of pipes. Hence the definition as contained in HSN cannot be construed that the product in question can be termed as pipe fittings as classified under 7307.00.

14. Apart from the above fact, the Supreme Court has repeatedly held that the tariff entries must be interpreted as per the commercial parlance test and not in the scientific and technical terms. In connection with the above proposition of law, it is useful to refer to the decisions referred in Indo International Industries vs. Commissioner of Sales Tax (1981 E.L.T. 325 SC), Pharm Aromatic Chemicals vs. Municipal Corporation of Greater Bombay (1997 (95) E.L.T. 203 (Bom)), Novopan India Ltd. vs. Collector of Central Excise and Customs (1994 (73) E.L.T. 769 (SC)), G.S.Auto International Ltd vs. Collector of Central Excise, Chandigarh (2003 (152) E.L.T. 3 (SC)) and National Mineral Development Corporation Ltd vs. State of Madhya Pradesh (2004 (7) Supreme 372).

15. As regards the contention to the effect that a writ is not maintainable and only an appeal shall lie is concerned, the Apex Court and this Court in number of decisions has taken the view that the question of alternative remedy should be raised at the earliest point of time and not at the final hearing of the writ petition. In the instant case, the writ petition was admitted as early as in the year 1997, and in the year 2005, the writ petition is not liable to be dismissed on this score. In this connection, it is useful to refer to a decision of the Apex Court in A.V.VENKATESWARAN, COLLECTOR OF CUSTOMS, BOMBAY vs. RAMCHAND SOBHRAJ WADHWANI AND ANOTHER (1983 (13) E.L.T. 1327 (SC)), wherein it is held as follows:-

> "It is true that existence of an alternate remedy is a bar to the maintainability of a petition under Article 226 of the Constitution unless there is a complete lack of jurisdiction in the officer of authority concerned or where the order has been passed in violation of principles of natural justice, but this rule is a rule of policy, convenience and discretion rather than that of law. Therefore, where the order levying duty at the higher rate is based on an incorrect interpretation of the tariff entry and that too on the Board's ruling, the alternative remedy being facility, would not operate as a bar in exercising writ jurisdiction under Article 226 of the Constitution of India."

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16. As regards the contention urged by the learned Central Government Standing Counsel to the effect that judicial review is not permissible, inasmuch as the product is classified under a wrong entry, in the absence of sufficient materials, it is always open to this Court, in exercise of powers conferred under Article 226 of the Constitution, to set aside the manifest error on the part of the authorities.

17. For the reasons stated above, I am of the opinion that the impugned order is liable to be quashed and accordingly, the writ petition is allowed. No costs.

svn

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1.Customs, Excise and Gold
(Control) Appellate Tribunal,
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2.The Commissioner of Central Excise
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Tiruchirappalli-620 001.

+ 1 cc to Mr.K.Veeraraghavan, SCGSC SR No.13178

+ 1 cc to Mr.C.Saravanan, Advocate SR No.13206

ORDER IN
WP.10546 of 1997

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